No. 10,303

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WASHINGTON BREWERS INSTITUTE, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

OPENING BRIEF ON BEHALF OF APPELLANTS, ACME BREWERIES AND KARL F. SCHUSTER.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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HOW APPEAL COMES BEFORE THIS COURT.

An indictment was brought against numerous defendant breweries, associations and officers thereof charging violations of the Sherman Act. Demurrers were filed attacking the sufficiency of the indictment. The demurrers were overruled. The appellants pleaded *nolo contendere* and fines were imposed. Appeals were taken which present the question of the sufficiency of the indictment. This brief is written on behalf of appellants, Acme Breweries and Karl F. Schuster.

THE INDICTMENT.

The indictment charges a conspiracy under Section 1 of the Sherman Antitrust Act. The gravamen of the indictment is that defendants "have wilfully and unlawfully formed and engaged in a wrongful and unlawful combination and conspiracy to raise, fix, stabilize and maintain, uniform, artificial and non-competitive prices for beer sold and distributed in the Pacific Coast Area in interstate trade and commerce as aforesaid, and as a part of said conspiracy and in pursuance thereof, said defendants have arbitrarily, wilfully, and unlawfully raised, fixed, stabilized and maintained uniform, artificial and non-competitive prices in the sale of beer in interstate trade and commerce in the Pacific Coast Area, as aforesaid".

The indictment sets out the means and methods which the defendants agreed upon and utilized to effectuate the purpose and intent of the conspiracy. It affirmatively appears by the allegations that the states of the Pacific Coast Area have enacted laws, compliance with which has in large measure constituted the methods and means alleged to have been employed by the defendants.

Subdivision (i) of Section 16 reads as follows:

> "Under the respective laws of the States of the Pacific Coast Area relating to the manufacture, sale, distribution and consumption of alcoholic liquors and alcoholic malt beverages, there was created in each of said States a control authority known as a liquor control board or commission or commissioner or administrator, said authority being charged by statute with the enforcement of

the provisions of said laws and empowered to make all necessary and proper rules and regulations in the administration thereof. Defendants agreed upon, recommended and urged the adoption and promulgation by the respective control authority in each State of said Pacific Coast Area of rules and regulations whereby each of said States was arbitrarily divided into geographical trade areas known as 'zones' and all brewers and importers of beer selling beer in said zones were required to file with said control authority in each of said States price lists which were designated and known as 'price postings' showing the prices at which beer manufactured by such brewers and imported by such beer importers should be sold in each of said zones; said rules and regulations prohibited the sale of beer at prices other than those so posted, and imposed penalties for failure to adhere to such posted prices; said rules and regulations further provided that prices posted in said States, as aforesaid, should not become effective until a certain period of time had elapsed after the filing thereof; and said rules and regulations further required all breweries and importers, desiring to engage in business in the sale of beer in said States in said Area, to file with respective control authority copies of all written contracts and memoranda of oral agreements, including all terms and conditions of sale, between breweries and wholesalers and between importers and breweries and wholesalers engaged in business in the sale of beer in said States; defendants recommended and urged the adoption of said zones and said price posting rules and regulations by the liquor control authority in each State as aforesaid so that said zoning and price posting systems could be utilized by the defendants to further and

effectuate their unlawful scheme and conspiracy to raise, fix, make uniform, and maintain arbitrary and non-competitive prices and terms and conditions of sale of beer in the Pacific Coast Area as aforesaid."

It affirmatively appears that each of the Pacific Coast Area states has a law governing the manufacture, sale, distribution and consumption of alcoholic liquors and alcoholic beverages, and that each law provides for the creation of a control board or commission or administrator for the enforcement of laws, and with authority to make all necessary and proper rules and regulations in the administration thereof. While the provisions of the laws themselves are not otherwise set forth, it is affirmatively alleged that the control authorities in each of said states have enacted rules and regulations which embrace substantially the means and methods alleged to have been employed by the defendants and which are alleged to have the effect of fixing and maintaining prices in interstate commerce. Defendants are charged with having agreed upon, recommended and urged the adoption and promulgation of the rules and regulations. In how far the rules and regulations followed the requirements of the statutes themselves, does not appear. They must, however, have come within the scope and general provisions of the statutes in order to be valid regulations and not unlawful attempts at legislation.

The indictment charges the defendants with a violation of Federal law by having committed acts, in whole or in part, required by state laws, and the existence of which state laws is affirmatively disclosed

on the face of the indictment. It affirmatively appears that the states have passed laws which require prices to be publicly announced and posted at least ten days in advance of the time they become effective; require public record of contracts of sale; require adherence to prices that have been posted; require licensing of both sellers and buyers; recognize the place of trade associations of manufacturers in the industry and provide that they shall act as enforcement agencies of the law. It is charged that defendants organized associations, the existence of which is contemplated by state laws; that prices were fixed and established by procedure required by state laws; the indictment charges that contracts were of uniform terms, and at the same time recites the existence of state laws both restricting the terms of all contracts and requiring that all contracts should be of public record; that defendants classified customers and required each class to adhere to classifications and prices, and yet that this was the very thing required by the state legislation; that defendants used uniform types of containers, and that this was, likewise, required by state regulations; that defendant associations collected fines for violations of regulations and that state laws provided the basis and right for such collection; that defendants sought to compel adherence to the prices established, and that this was the very thing that the state laws wanted accomplished.

The indictment charges that defendants influenced the making of the regulations under the statutes, but it is not recited that any improper means were used, nor does it appear that the regulations were other than

such as were contemplated by the statutes, nor that they were in any respect at variance with, contrary to or beyond the scope of the statutes themselves.

THE ISSUE.

The basis of jurisdiction is interstate commerce. The indictment alleges that interstate commerce is involved because beer in certain quantities has been shipped between the states. (Tr. p. 16.) It alleges nothing further. This would be a sufficient allegation as to any ordinary commodity, interstate shipment of which states have no power to bar, burden, restrain or regulate. Interstate shipment ordinarily constitutes interstate commerce, the regulation of which is vested in the Federal Government. It is the position of appellants that in view of the Twenty-first Amendment to the Constitution, the mere allegation that beer, an intoxicating liquor, has been shipped between states is an insufficient allegation of Federal jurisdiction. It is entirely consistent that shipments were made interstate and yet were outside the domain of interstate commerce. It is further the position of these appellants that, inasmuch as it affirmatively appears by the indictment that the states have enacted laws to regulate and control prices and methods of merchandising the commodity, compliance with which has resulted in the elimination of competition and uniformity of prices, the supremacy of the state laws nullifies what would otherwise constitute a violation of Federal laws.

These appellants rely upon the following points:

1. The Sherman Antitrust Act is only applicable to cases directly affecting interstate commerce.

2. To the extent that a state has legislated concerning the delivery into, or use within, such state of intoxicating liquors, such legislation is paramount, and to the extent thereof, intoxicating liquors have been removed from interstate commerce and the jurisdiction of Federal laws, the application of which is dependent upon interstate commerce.

3. An indictment for violation of the Sherman Act must show that interstate commerce has been directly affected and the indictment in this case is deficient in this respect.

4. A combined intent and purpose to comply with the laws that the states have enacted pertaining to intoxicating liquors cannot constitute a violation of Section 1 of the Sherman Act.

ARGUMENT.

I.

THE SHERMAN ANTITRUST ACT IS ONLY APPLICABLE TO CASES DIRECTLY AFFECTING INTERSTATE COMMERCE.

The Federal jurisdiction depends solely on the "commerce clause" of the Constitution. Unless the acts charged constitute a direct and substantial burden on interstate commerce, the indictment falls.

"The Sherman Anti-trust Act, 15 U.S.C.A., sections 1-7, 15 note, derives its authority from the power of Congress to regulate commerce among the states. Blumenstock Brothers Advertising Agency v. Curtis Publishing Co., 252 U. S. 436, 40 S. Ct. 385, 64 L. Ed. 649. Assuming that transactions constituting intrastate commerce may come within the provisions of the Sherman Act (Local 167 v. United States, 291 U. S. 293, 297, 54 S. Ct. 396, 78 L. Ed. 804), it still is necessary that appellee prove that the dealings of appellants, which form the subject matter of the complaint, operate substantially and directly to restrain and burden interstate commerce. Cf. Santa Cruz Fruit Packing Co. v. National Labor Relations Board, supra.

"We do not regard the transactions complained of as creating a direct and substantial burden on interstate commerce."

Ewing-Von Allmen Dairy Co., Inc. v. C. and C. Ice Cream Co., Inc., 109 Fed. (2d) 398, 900.

See also:

U. S. v. Patten, 226 U. S. 525, 57 L. Ed. 333;

U. S. v. Trenton Potteries Co., 273 U. S. 392, 71 L. Ed. 700;

Blumenstock Brothers Advertising Agency v. Curtis Publishing Co., 252 U. S. 436, 64 L. Ed. 649.

II.

TO THE EXTENT THAT THE STATE HAS LEGISLATED CONCERNING DELIVERY INTO, OR USE WITHIN, SUCH STATE OF INTOXICATING LIQUORS, SUCH LEGISLATION IS PARAMOUNT, AND TO THE EXTENT THEREOF, INTOXICATING LIQUORS HAVE BEEN REMOVED FROM INTERSTATE COMMERCE AND THE JURISDICTION OF FEDERAL LAWS, THE APPLICATION OF WHICH IS DEPENDENT UPON INTERSTATE COMMERCE.

Section 2 of the Twenty-first Amendment to the Constitution of the United States reads as follows:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited."

The effect of this section has been to vest in the states the unrestricted power to control the importation into and use within its boundaries of intoxicating liquors. Such legislation is not limited by the "commerce clause" of the Constitution, and to the extent that the state legislature has legislated thereon, intoxicating liquors have ceased to be an article of interstate commerce. The constitutional amendment contemplates that the right and power of the state to have full and complete control of intoxicating liquors is of greater importance than infractions of laws intended to preserve the integrity and freedom of interstate commerce, and has given state laws upon the subject priority and precedence.

This principle has been decided by the Supreme Court of the United States and has been repeatedly

declared by other Federal Courts. There can be no question of the power of the state to make valid laws excluding intoxicating liquors entirely, confining the right of sale to designated agencies, fixing prices, creating monopolies, and otherwise directly and drastically impeding and interfering with interstate commerce in that commodity.

> "The Amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof', abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the state power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying in effect: The state may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.
>
> "The plaintiffs argue that, despite the Amendment, a state may not regulate importations except for the purpose of protecting the public health, safety or morals; and that the importer's license fee was not imposed to that end. Surely the state may adopt a lesser degree of regulation than total prohibition. *Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations*

by confining them to a single consignee? Compare Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394; Vance v. W. A. Vandercook Co., 170 U. S. 438, 42 L. Ed. 1100, 18 S. Ct. 674. There is no basis for holding that it may prohibit, or so limit, importation only if it establishes monopoly of the liquor trade. It might permit the manufacture and sale of beer, while prohibiting absolutely hard liquors. If it may permit the domestic manufacture of beer and exclude all made without the state, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee? Moreover, in the light of history, *we cannot say that the exaction of a high license fee for importation may not, like the imposition of the high license fees exacted for the privilege of selling at retail, serve as an aid in policing the liquor traffic.* Compare Phillips v. Mobile, 208 U. S. 472, 479, 52 L. Ed. 578, 581."

State Board of Equalization v. Young's Market, 299 U. S. 59, 81 L. Ed. 38.

"The claim of unconstitutionality is rested, in this Court, substantially on the contention that the statute violates the commerce clause. It is urged that the Missouri law does not relate to protection of the health, safety and morality, or the promotion of their social welfare, but is merely an economic weapon of retaliation; and that, hence, the Twenty-first Amendment should not be interpreted as granting power to enact it. Since that amendment, *the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause.* As was said in State Bd. of Equalization v. Young's Market Co., 299 U. S. 59, 62, 81 L. Ed. 38, 40, 57 S. Ct. 77,

'The words used are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes.' To limit the power of the states as urged 'would involve not a construction of the amendment, but a rewriting of it'. See also Mahoney v. Jacob Triner Corp., 304 U. S. 401, 82 L. Ed. 1424, 58 S. Ct. 952; Indianapolis Brewing Co. v. Liquor Control Commission, 305 U. S. 391 ante, 243, 59 S. Ct. 254. Affirmed."

Finch & Co. v. McKittrick, 305 U. S. 395, 83 L. Ed. 246.

"If the importation of intoxicating liquor is acceptable to a state, it retains its status as the legitimate subject of interstate commerce, but if it is forbidden importation by the state, the laws of the United States likewise forbid it. * * * Any state may, however, remove intoxicating liquor as a subject of interstate commerce. When it does so by passing a law on the subject of its importation, the law of the United States forbids its further importation if in violation of the laws of the state. Such is now the law and that the law was once otherwise goes for naught. * * * The traffic in intoxicating liquors is universally known to be loaded with danger to the public weal. It may be subjected to the most stringent regulation. Licenses to sell to the ultimate consumer may be limited to those who in the conduct of the business can be brought under control and supervision. The traffic is one emphatically 'fraught with public interest'. No one can claim 'the right and privilege' to do harm to others. The regulation of the traffic by state laws, in the attempt to minimize the evils attending it, is no infringement of

the rights of anyone. It is no denial of any of 'the privileges and immunities' of citizens of the United States."

Premier Pabst Sales Corp. v. Grosscup, 12 Fed. Supp. 970;

Wylie v. State Board of Equalization, 21 Fed. Supp. 604;

Mahoney v. Jacob Triner Corporation, 304 U. S. 401;

Indianapolis Brewing Co. v. Liquor Control Commission, 305 U. S. 391;

Ziffrin, Inc. v. Reeves, 308 U. S. 132;

William Jameson & Co. v. Morgenthau, 25 Fed. Supp. 771.

Section 2 of the Twenty-first Amendment is very similar to the Webb-Kenyon Act. (27 U.S.C.A., Section 122.) The Webb-Kenyon Act was first enacted in 1913 and reenacted in 1935. The Act is entitled "An act divesting intoxicating liquors of their interstate character in certain cases." It provides:

"That the shipment or transportation in any manner or by any means whatsoever of any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind from one State, Territory or District of the United States * * * into any other State, Territory or District of the United States * * * which said spirituous, vinous, malted, fermented or other intoxicating liquor is intended by any person interested therein to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory or District of the United States, or place non-con-

tiguous to but subject to the jurisdiction thereof, is hereby prohibited."

Long prior to the enactment of the Twenty-first Amendment, it was definitely held and established that intoxicating liquors were divested of their interstate character to the extent that the state legislated thereon. The Federal Government retained jurisdiction under the "commerce clause" only to the extent that such retention was consistent with state regulations of traffic in the commodity.

Adams Express Company v. Commonwealth of Kentucky, 238 U. S. 190, 59 L. Ed. 1267;
Sturgeon v. State (Ariz.), 154 Pac. 1050.

As above stated, on August 27, 1935, Congress reenacted the Webb-Kenyon Act without change. There have been a number of decisions since its reenactment holding that the states are free to regulate liquor traffic free of restriction of the "commerce clause" of the Federal Constitution.

Dugan v. Bridges, 16 Fed. Supp. 694;
General Sales and Liquor Co. v. Becker, 14 Fed. Supp. 348;
Commonwealth v. One Dodge Motor Truck, 191 A. 590.

Prior to the Webb-Kenyon Act the Wilson Act was enacted in 1890, which divested intoxicating liquors of their character of an article of interstate commerce to the extent that upon arrival in the state, intoxicating liquors became subject to the exercise of the police power of the state in the same manner as though such liquors had been produced in the state itself.

Consequently, one who complies with state laws and regulations pertaining to intoxicating liquors cannot be guilty of a Federal crime exclusively founded and based upon the "commerce clause" of the Constitution. Otherwise, the states' police power over this commodity, a power which the Twenty-first Amendment and the Webb-Kenyon Act expressly and deliberately preserve, would be fundamentally emasculated and impaired.

III.

AN INDICTMENT FOR VIOLATION OF THE SHERMAN ACT MUST SHOW THAT INTERSTATE COMMERCE HAS BEEN DIRECTLY AFFECTED AND THE INDICTMENT IN THIS CASE IS DEFICIENT IN THIS RESPECT.

The very essence of a conspiracy under the Sherman Act is that it must affect "trade or commerce among the several states, or with foreign nations". This means a direct and positive effect, and not an incidental effect, upon interstate or foreign commerce. It is essential, therefore, that the indictment should definitely and succinctly cover this gist of the crime.

> "From the rules of particularity and certainty already noted, the indictment or information must state specifically all the facts and circumstances necessary to constitute the offense charged. A conviction cannot be sustained where all the facts stated in the indictment might be true and still accused might not be guilty of the offense intended to be charged."
>
> 31 *C. J.* 693.

"It is a cardinal rule of criminal pleading that an indictment must portray all the facts that constitute the crime sought to be charged so that the court, from an inspection of the indictment can say that, if all the facts alleged are true, the defendant is guilty."

State v. Beliveau, 114 Me. 477, 479, 96 A. 779.

"The indictment must show on its face that if the facts alleged are true, and assuming that there is no defense, an offense has been committed. It must therefore state explicitly and directly every fact and circumstance necessary to constitute the offense, whether such fact or circumstance is an external event, or an intention or other state of mind, or a circumstance of aggravation affecting the legal character of the offense. Unless the indictment complies with this rule, it does not state the offense. The charge must always be sufficient to support itself. It must directly and distinctly aver every fact or circumstance that is essential, and it cannot be helped out by the evidence at the trial or be aided by argument and inference. With rare exceptions, offenses consist of more than one ingredient, and in some cases of many; and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad."

Clark Cr. Proc., p. 153.

Inasmuch as interstate commerce is not involved in the case of intoxicating liquors to the extent of state legislation upon the subject, and inasmuch as it affirmatively appears by the indictment in this action that the states in the Pacific Coast Area have enacted

laws to control traffic therein, and that the acts of the defendants may reasonably have been in compliance with and pursuant to such laws, and to accomplish the purpose and intent thereof, the indictment is legally insufficient. Even if the indictment were silent as to the state laws, this Court will take judicial notice of the same.

> "The laws of every state and territory of the Union and of the District of Columbia, whether consisting of constitution, public statutes or judicial decisions, are judicially noticed by federal courts when exercising original jurisdiction or appellate jurisdiction from another federal court."
>
> 23 *C. J.* 127.

> "The law of any state of the Union, whether depending upon statute or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice."
>
> *Lamar v. Micou,* 114 U. S. 218, 29 L. Ed. 94.

The Twenty-first Amendment has, in effect, provided that it is the supreme law of the land that intoxicating liquors shall not constitute an article of interstate commerce except to an extent consistent with state laws governing their importation and use. The Sherman Act is necessarily subject to this constitutional provision and it must be read into the Act itself. The Act, therefore, contains an implied provision that intoxicating liquors are without the scope thereof, except the purpose of the conspiracy and acts done in furtherance thereof are not authorized or required by state laws governing their importation and use. To the extent that intoxicating liquors have been

withdrawn from interstate commerce, the Sherman Antitrust Act has been nullified and superseded. A crime, therefore, cannot be stated without an allegation showing that the acts complained of are not authorized or required by state laws.

Everything alleged in this indictment is consistent with the innocence of the defendants. Not only that, but it affirmatively appears that many of the very acts complained of are definitely required by state laws. Intoxicating liquors differ from any other commodity. It is not sufficient to simply allege that they were shipped from one state to another. Such an allegation would constitute a sufficient statement that interstate commerce is involved in the case of other commodities. In the case of intoxicating liquors, however, interstate commerce is involved only if, in conjunction with interstate transportation, there be the added factor and element that state legislation has not restricted and regulated the importation and use of the commodity in the field in which it is claimed that its identity as an article of interstate commerce exists.

Federal jurisdiction will only exist if the states have not enacted legislation inconsistent with the Federal law and rendering it inapplicable. To the extent that the states have acted, their laws and regulations are paramount.

> "In indictments in the Federal Courts, where the offense is not clearly within the Federal jurisdiction, every fact essential to that jurisdiction must be clearly and distinctly averred."
>
> 31 *C. J.* 668.

The situation is analogous to an act that must be committed outside the jurisdiction of the state in order to give the Federal Government jurisdiction. The fact that the act has been committed outside the state jurisdiction must be distinctly averred. The Twenty-first Amendment has placed beer within the jurisdiction of the state. Facts must be alleged to show that it has been bought within Federal jurisdiction.

> "In cases of this kind, where the act comes to the border line of Federal jurisdiction, it seems to us an imperative duty upon the Court to hold the pleader to a distinct and clear averment of every fact which is essential to give Federal Courts jurisdiction, and that we ought not by inference and presumption open the door so as to include matters which may or may not be an offense against the United States."
>
> *United States v. Morrissey,* 32 Fed. 147, 152.

In pursuing an inquiry as to the existence of a violation of the Sherman Act, when the commodity involved is intoxicating liquor, the first point to be determined is the effect of the operation of state legislation enacted in pursuance of the Twenty-first Amendment. That is a primary and fundamental question and it must be disposed of affirmatively in any indictment.

The very use of the word "beer" in the indictment withdraws the case from the operation of rules which appertain to and govern other subjects of commerce between the states. Beer may or may not be a commodity subject to interstate regulation by the Federal Government under the "commerce clause", depending

upon the nature and effect of state enactments with respect thereto. In any given case, the Government must first ascertain and then plead that beer is an interstate commodity, if such is, under the laws of the state in question, the fact.

IV.

A COMBINED INTENT AND PURPOSE TO COMPLY WITH THE LAWS THAT THE STATES HAVE ENACTED PERTAINING TO INTOXICATING LIQUORS CANNOT BE CRIMINAL.

If the laws of the states contemplate that prices shall be controlled, established, regulated and maintained and that the police power of the state over liquor traffic can be facilitated by the elimination of price competition and price cutting in this commodity, a combined purpose of manufacturers to comply with and adhere to the intent and purpose of such laws cannot constitute a criminal conspiracy. The Twenty-first Amendment and the Sherman Act must be read and construed together, and the Amendment constitutes an express exception in the definition of the crime when intoxicating liquor is the article involved. A combination, the purpose and object of which is compliance with state laws and regulations governing traffic in and use of intoxicating liquors, is a combination for a lawful purpose and is necessarily excepted.

> "Although conspiracy differs in many respects from crimes in general, and a purpose formed in common by more than one person may be fraught with danger and involve punishment from which a single individual is exempt, still the gist of the

offense is always the common purpose to do an unlawful act, or a lawful act by wrongful means. Either the act or the means must be wrongful.

"This count of the indictment, conforming to the terms of the act, does not charge as the common purpose an unlawful act, nor wrongful means to accomplish lawful ends, and the demurrer thereto must also be sustained."

United States v. Bernstein, 267 Fed. 295, 299-300.

"A conspiracy is 'a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means'. Pettibone v. United States, 148 U. S. 197, 13 S. Ct. 542, 545, 37 L. Ed. 419; Duplex Printing Press Co. v. Deering, 254 U. S. 443, 465, 41 S. Ct. 172, 176, 65 L. Ed. 349, 16 A.L.R. 196; and see United States v. Hutto, 256 U. S. 524, 528, 41 S. Ct. 541, 543, 65 L. Ed. 1073, and Weinger v. United States (C.C.A. 9), 47 F. (2d) 692, 693. * * *

"The purpose to be accomplished by the conspiracy may be either lawful or unlawful. If the purpose is lawful and is carried out by lawful means, then no offense is committed."

Marine et al. v. United States (Ninth Circuit), 91 Fed. (2d) 691, 693-694.

"To constitute a criminal conspiracy, there must be a conspiracy to do an unlawful act which amounts to a crime. Lipschitz v. People, 25 Colo. 265, 53 Pac. 1111. * * * The conspiracy charge had to be for some unlawful act which amounted to a crime * * * In a conspiracy charge the

alleged unlawful act which the parties have in contemplation is one of the principal ingredients of the crime; that is to say, if the acts which they are charged as conspiring to do were not unlawful, then the information does not charge a conspiracy. * * * If the defendants had done all the things said of them in the information on January 1st, they would not have violated the prohibition statute of 1915."

Noble v. People, 180 Pac. 562, 563.

"If the object to be obtained was innocent, and if the means used were also innocent, there was no conspiracy."

Justin Seubert, Inc. v. Reiff, 164 N. Y. S. 522, 524.

"Where the purpose of the agreement is lawful, and the means used in effecting such purpose are also lawful, a conspiracy charge will not lie; and a statute which assumes to make it a crime for persons to conspire to sell their goods at prices they will sell for in the course of trade, without regard to the means to be employed, is invalid."

15 *C. J. S.* 1065.

CONCLUSION.

At least to the extent of state legislation upon the subject, beer has been withdrawn from interstate commerce. While with respect to other commodities an allegation of interstate shipment will be sufficient to constitute an allegation of interstate commerce, such is not true in the case of beer. It requires interstate

shipment plus another essential factor. That factor is that the state has not exercised its jurisdiction so as to either authorize or require the acts complained of. This is not a matter of defense but an essential element of Federal jurisdiction, and Federal jurisdiction is not laid without averring that the state, to which has been delegated primary jurisdiction over the subject matter, has not enacted legislation in conflict with the Federal statute, which is claimed to have been violated.

It affirmatively appears by this indictment that state laws have been enacted, the very object and purpose of which is to eliminate competition, stabilize and maintain prices. The laws are adapted to regulate traffic and they aim at uniformity in price and methods of marketing. They in effect require what the Sherman Act bans. Compliance with such laws cannot constitute a Federal crime. The state laws and Federal statutes are in conflict and under the constitutional amendment the state laws are paramount.

It is respectfully submitted that the demurrer to the indictment should be sustained.

Dated, San Francisco,
February 5, 1943.

Respectfully submitted,
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